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Calendar No. 739

101ST CONGRESS *2d Session*	SENATE	REPORT 101-396

TELEMARKETING AND CONSUMER FRAUD AND ABUSE PREVENTION ACT

Mr. HOLLINGS, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

OF THE

SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ON

S. 2494

JULY 26 (legislative day, JULY 10), 1990.—Ordered to be printed

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101ST CONGRESS
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SENATE

REPORT
101-396

TELEMARKETING AND CONSUMER FRAUD AND ABUSE PREVENTION ACT

JULY 26 (legislative day, JULY 10), 1990.—Ordered to be printed

Mr. HOLLINGS, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

[To accompany S. 2494]

The Committee on Commerce, Science, and Transportation to which was referred the bill (S. 2494) to strengthen the authority of the Federal Trade Commission regarding fraud committed in connection with sales made with a telephone, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

PURPOSE OF BILL

The bill, as reported, is intended to prevent fraudulent or harassing telemarketing practices by requiring the Federal Trade Commission (FTC) to promulgate rules regarding telemarketing practices, by enhancing the enforcement of those rules, and by enhancing the consumer fraud enforcement tools available to the FTC.

BACKGROUND AND NEEDS

Selling primarily over the telephone, often called telemarketing, has become an increasingly popular way to sell goods and services. Industry sources estimate that billions of dollars in sales are made over the telephone each year. Legitimate purchases are made by telephone in increasing numbers, and consumers often purchase items over the telephone by charging purchases to their credit card.

Telemarketing fraud is the deceptive peddling of goods and services over the telephone. Estimates of the annual cost of this fraud

are in the $1 billion range. Typically, a consumer is contacted and offered goods and services at discount prices or prices of a nature literally too good to be true. Payment is generally required in advance. Sometimes the product is never delivered. If the goods or services arrive, the consumer finds that the bargain does not exist, or is not of the promised value. Often, the purchaser is told that he or she will receive a valuable prize if something is purchased, and the purchaser then in fact does not receive such a prize.

These fraudulent schemes have involved the sale of vitamins, diet aids, credit card protection programs, luggage, travel, and office machine supplies. In addition, the FTC has brought actions against fraudulent telemarketing sellers of oil and gas leases, diamonds and other gemstones, applications for cellular telephone lotteries, and rare coins. The fraud affects a cross-section of Americans, including small business, the elderly, and middle-income persons. The effects of telemarketing fraud are felt throughout the Nation, and both consumers and legitimate telemarketers are affected. In addition, credit card companies are victims of telemarketing fraud, because they often must absorb credit charges when the purchaser realizes he or she has been defrauded and refuses to pay the credit charges.

In addition, certain telemarketing practices are annoying to or difficult for consumers even if no fraudulent transaction takes place. These practices include calling at inconvenient or unreasonable hours, the use of automatic dialing machines that cannot be disconnected by the person called, and a refusal to permit the purchaser to rescind a purchase within a reasonable time.

The FTC has some current authority to address fraudulent practices affecting the consumer under sections 5 and 13 of the FTC Act, which prohibit unfair and deceptive acts or practices affecting commerce. The FTC indicates that in 1987 it received approximately 3,100 complaints concerning telemarketing fraud and about 269 different firms were involved. The number of complaints received by the FTC has grown by about 20 percent each year. Some such practices also are covered by criminal statutes enforced by the Postal Service (mail fraud) and the Secret Service (credit card and computer fraud). In addition, many States pursue fraudulent activities under State law, and some States (e.g., California and Nevada) have enacted specific telemarketing fraud legislation. Additionally, the FTC and the National Association of Attorneys General have established an automated data bank on telemarketing fraud to share their collective information to assist in pursuing violators.

Despite increasing activities at the State and Federal level to address these issues, consumer fraud, and particularly telemarketing fraud, have continued at an unacceptably high rate.

Telemarketing differs from other sales activities in that it can be carried out by sellers across State lines without any meeting between buyer and seller. In addition, telemarketers by definition can be very mobile, easily moving from State to State. While legitimate telemarketers generally operate from a fixed site, the most frequent pattern of telemarketing fraud is a fly-by-night, "boiler room" operator whose contact with the consumer is limited to the telephone, and whose mobility and anonymity permit the consumer no recourse if goods are deficient or undelivered. This aspect of te-

lemarketing can make enforcement against fraudulent telemarketers difficult, particularly for State law enforcement officials. It may be difficult to bring cases or seize assets of defendants who simply can move across State lines. Even if court orders are obtained by a State against a fraudulent telemarketer in that State, the fraudulent telemarketer can continue to do business, and harm consumers, in other States. Additionally, while the FTC's current authority has been sufficient to allow it to pursue some fraudulent telemarketers, it has not promulgated rules to address specifically this problem. Moreover, the problem is of such a magnitude that the resources of the FTC are not sufficient to insure adequate consumer protection from these activities.

Thus, this is a widespread nationwide consumer problem that requires enforcement at the Federal level, and enforcement resources beyond those available to the Federal authorities responsible for enforcement. For this reason, the Committee has concluded that additional rulemaking by the FTC in addressing telemarketing, as well as additional enforcement by both the States and private citizen actions, are necessary to address a unique problem of this magnitude.

The Committee also is concerned about the increase in fraud across the country beyond telemarketing. Fraud against senior citizens has been of particular concern to the FTC (see, e.g. FTC hearings on the elderly, March 16, 1988) and Members of this Committee. For that reason, this bill also incorporates broad-based improvements to the FTC consumer protection authority drawn from legislation that has been sponsored during the last two Congresses by Senator McCain.

Because of the unique nature of the problem addresed by this bill, the Committee intends that the authority and responsibility created by this bill be separate from the FTC Act. Interpretations of this bill should not impact or be affected by the FTC Act, except as otherwise noted.

Legislative History

S. 2494 was introduced by Senator Bryan, Chairman of the Consumer Subcommittee, on April 23, 1990. It is cosponsored by Senator McCain. On May 2, 1990, the Consumer Subcommittee held a hearing on S. 2494 and S. 1441, a consumer fraud bill introduced by Senator McCain. Witnesses included Chairman Steiger of the FTC, as well as representatives of the State attorneys general, the business community engaged in telemarketing, the credit card companies, and consumers.

On June 27, 1990, the Committee ordered S. 2494 reported with an amendment in the nature of a substitute. The substitute amendment included the text of S. 2494 as introduced, with varifying amendments, and the substance of most of the provisions from S. 1441.

Summary of the Legislation

As reported, the bill requires the FTC to promulgate telemarketing rules, including rules prohibiting and defining "fraudulent telemarketing acts or practices," and to consider certain other rules to

prevent abusive or unfair telemarketing practices. The bill does not preempt State law in the area, and the States would be permitted to continue enforcing their laws in State court actions. The Federal laws created by this legislation would be enforceable exclusively in Federal court.

Additionally, the bill permits State attorneys general to bring civil actions in U.S. district courts for violations of the telemarketing rules to be promulgated by the FTC, and the FTC is permitted to intervene in such actions. It also permits consumers and financial institutions to bring lawsuits for violations of the rules established under the bill directly against those engaged in telemarketing fraud, if the amout in controversy exceeds $50,000.

To assist the FTC in its enforcement efforts generally, the bill expands the current venue and subpoena authority available to the FTC, to permit access to businesses that move frequently to avoid legal process and to extend the subpoena authority to physical evidence. In this same vein, the bill would permit court-ordered production of financial records in connection with FTC enforcement without notice to the party whose records are being produced, if the court finds that the party is likely to transfer assets to avoid seizure. Additionally, the bill would permit the FTC to seek criminal contempt remedies for violations of court orders it obtains. The FTC also is required to establish a clearinghouse for sharing information received by Federal agencies concerning telemarketing.

Finally, in order to insure review of the effectiveness and the reasonable implementation of the new mechanisms created to address telemarketing fraud, the rulemaking requirements and the authority for enforcing the new rules by the attorneys general and private parties would cease to exist 5 years after enactment unless reenacted by Congress.

ESTIMATED COSTS

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 18, 1990.

Hon. ERNEST F. HOLLINGS,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 2494, the Telemarketing and Consumer Fraud and Abuse Prevention Act, as ordered reported by the Senate Committee on Commerce, Science and Transportation, June 27, 1990. We expect that enactment of the bill would cost the federal government about $600,000 in fiscal year 1991 and between $400,000 and $500,000 each year thereafter, assuming appropriation of the necessary amounts. CBO estimates that the costs incurred by states to prosecute certain cases could be reduced as a result of this bill.

S. 2494 would require the Federal Trade Commission (FTC) to initiate a rulemaking proceeding to prescribe regulations for telemarketing activities within 180 days of enactment. The regulations would cease to be effective after five years. In addition, the FTC would be required to establish a clearinghouse for inquiries made to federal agencies concerning telemarketing. Another provision would require the FTC to study unfair or deceptive acts or practices in the life care home industry within two years. Finally, S. 2494 would permit state officials to bring civil suits against any party engaging in telemarketing fraud. This provision would sunset after five years.

Based on information from the FTC, CBO estimates that the rulemaking requirement would impose costs of about $200,000 in 1991 to initiate the proceeding and begin enforcing the rule and $100,000 annually thereafter for ongoing enforcement. CBO estimates that establishment and operation of the clearinghouse would cost about $300,000 each year. We assume that the FTC would utilize a toll-free telephone number and would hire additional staff to monitor calls and record relevant information in a centralized data bank. In addition, CBO estimates that the FTC would incur costs of about $100,000 in both 1991 and 1992 to prepare the required study on the life care home industry.

The provision permitting state officials to sue for telemarketing fraud could reduce the aggregate number of such cases nationwide. Under current law, a state can bring action against a party allegedly engaging in telemarketing fraud and, upon a favorable judgment for the state, can ban the party from operating in that state. However, the party is not prohibited from operating in other states, and each affected state must individually bring action against the fraudulent operation. S. 2494 would eliminate this duplicative action by permitting individual states to bring nationwide action against a party allegedly engaging in telemarketing fraud. As a result, we expect that aggregate administrative and court costs incurred by state governments could be reduced as a result of enactment of this bill.

If you wish further details on this estimate, we will be pleased to provide them. The staff contact is Laura Carter, who can be reached on 226-2860.

Sincerely,

ROBERT D. REISCHAUER,
Director.

REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation, as reported.

NUMBER OF PERSONS COVERED

The bill would require additional rules governing telemarketing practices. The FTC currently has authority to prevent unfair and deceptive trade practices on the part of any business, and to issue regulations in that regard to cover any business including those engaged in telemarketing. However, the bill would require that addi-

tional regulations be promulgated. Those rules would apply to any individual or business engaged in telemarketing, and thus all parties in that category would be subject to some additional regulation.

Additionally, the bill permits enforcement of the rules to be promulgated by the State attorneys general and private parties who have incurred atl east $50,000 in damage. To the extent that either of these groups acts to enforce the new rules, the number of parties affected by the bill will include those groups. The number of private parties who will incur such a level of damage is expected to be small.

ECONOMIC IMPACT

The additional regulatory activity required by the FTC is not expected to result in significant cost, is expected to be carried out under current budgetary limits, and thus will not have a significant economic impact. The FTC will incur some, although not a significant amount of, additional cost in administering the information clearinghouse required by the bill, and in carrying out the life care home study.

To the extent that the bill fosters additional cooperative enforcement efforts between the Federal and State governments and the private sector, it should allow, at a minimum, the Federal Government to obtain the maximum enforcement of telemarketing fraud while using currently available resources and may reduce the overall cost of such enforcement. The expected reduction in telemarketing and consumer fraud as a result of this bill should save consumers and credit card companies substantial amounts of money, inasmuch as current estimates of telemarketing fraud alone are $1 billion per year.

PRIVACY

This legislation will not have any adverse impact on the personal privacy of the individual affected.

PAPERWORK

This legislation requires promulgation of some additional rules by the FTC, and will require some, although not significant, additional paperwork in that regard. To the extent that additional cooperative enforcement efforts between the States, the Federal Government, and the private sector result from this bill, the bill should reduce the amount of paperwork involved in enforcement efforts.

SECTION-BY-SECTION ANALYSIS

SECTION 1.—SHORT TITLE

This section states the short title of the bill as the "Telemarketing and Consumer Fraud and Abuse Prevention Act."

SECTION 2.—DEFINITIONS

This section sets out the definitions applicable to the bill. The most significant definition is that of "telemarketing," which is defined as a "plan, program, or campaign which is conducted to

induce purchases of goods or services by significant use of one or more telephones and which has involved interstate telephone calls * * *." Other uses of the telephone in connection with business or personal transactions are excluded from the definition of telemarketing.

It is the intention of the Committee that "telemarketing" include only those sales activities that substantially rely upon and are organized around the use of the telephone. By defining "telemarketing" in terms of "significant use" of the telephone, the Committee intends the definition to include any plan, program, or campaign which is conducted over the telephone to induce purchases of goods or services during the course of the telephone call, or which is designed so that there will necessarily be substantial reliance on telephone communication. However, the Committee is aware that telemarketing fraud schemes may involve not only the telephone but also some written or face-to-face contact. Thus, telemarketing can include transactions that involve other methods of contact together with telephone contact. However, ordinary business transactions which involve incidental use of the telephone, or contact initiated solely by the consumer for the consumer's convenience with no initial sales contact directed to a particular consumer, by phone or otherwise, from the seller, are not intended to be included within the definition. Among the examples of use of the telephone that are not intended to be within the definition are consumers' calls to order carry-out food or similar products, or consumers' calls to hotels or airlines for the purpose of making reservations.

It is intended tht the phrase "goods and services" be broadly construed so as not to exclude activities currently addressed by the FTC. For example, some of the telemarketing fraud activities which have been the subject of FTC investigations in the past involve sales of investments other than securities. It is intended that the FTC would have authority over such schemes under this bill, to the same extent it has jurisdiction under the current FTC Act.

Telemarketing for purposes of this bill must involve an interstate activity. The Committee intends that telemarketers otherwise within the bill's definition be covered by the bill if they perform an interstate telephone calls. If they do so, all activities of those telemarketers are to be covered by the bill, including those which may be within the confines of one State.

SECTION 3.—TELEMARKETING RULES

This section requires the FTC to promulgate certain rules in connection with telemarketing, including rules to prevent telemarketing fraud, and rules to regulate telemarketing activities generally.

Subsection (a) of this section requires rulemaking regarding telemarketing activities that are not otherwise fraudulent. The intention of this subsection is to provide for rules that will prevent abusive or harassing tactics in connection with telemarketing. The subsection does not mandate the content of the rules, but provides the FTC with discretion to tailor the rules as necessary in accordance with its experience with telemarketing activities.

The subsection requires that the FTC consider rules providing: (1) that goods or services ordered be shipped or provided within a

stated time-period, and that if they are not so shipped or provided the consumer be permitted to obtain a refund; (2) that persons who order goods or services may cancel that order within a specified time period; (3) that unsolicited telemarketing calls may be made only during certain hours of the day; (4) that the use of telemarketing calling equipment that does not permit termination of the call by the individual called is prohibited; and (5) that telemarketers must maintain certain records of their activities. The Committee recognizes that there may be situations in which rules of this type may not reasonably apply. However, the Committee expects the FTC to consider carefully rules in each of these areas, and, if rules are not promulgated in any of these areas, to publish the reasons for its decision not to issue such rules. This subsection also provides for public comment, in accordance with section 553 of title 5, U.S.C., during the course of the FTC's rulemaking directed by this subsection. With respect to rulemaking regarding automatic dialing devices, the Committee expects that the FTC will consult with the Federal Communications Commission (FCC) to insure the feasibility of any rule wich is issued.

Subsection (b) of this section requires that the FTC prescribe rules prohibiting fraudulent telemarketing acts or practices. These rules must include a definition of the term "fraudulent telemarketing acts or practices." The Committee recognizes that there are a myriad of forms that fraudulent activity in this area may take, and does not, therefore, intend that the FTC issue a definition that attempts to provide a complete list of all activities that could constitute fraudulent acts or practices. Rather, the Committee intends that the FTC's rule be flexible enough to encompass the changing nature of this activity, while at the same time providing telemarketing guidance as to the general nature of prohibited conduct. In this regard, the Committee notes that fraud is a serious charge, and should not be made in this context absent some element of intent to defraud on the part of the party charged, so that the definition of fraud, at a minimum, must require an intent to engage in fraudulent conduct.

The Committee further notes that section 19(a)(2) of the FTC Act (15 U.S.C. 57b(a)(2)) uses the phrase "dishonest or fraudulent" in connection with the showing that must be made by the FTC to obtain judicial enforcement of the FTC's cease and desist orders. It is the intention of the Committee that this section of the reported bill be separate from the FTC Act, and, therefore, that the FTC's rulemaking under this subsection not be limited by any use or interpretation of the phrase "dishonest or fraudulent" that has occurred in connection with the current FTC Act. Similarly, the FTC's definition of "fraudulent telemarketing acts or practices" under this subsection need not be used as an interpretive aid for the phrase used in section 19(a)(2) of the FTC Act.

Subsection (c) of this section requires that the FTC prescribe the rules required by this section within 180 days of enactment of this legislation. It further provides that the rulemaking shall be in accordance with the requirements of section 553 of title 5, U.S.C., and need not comply with any other rulemaking requirements set out in the current FTC Act.

Subsection (d) of this section provides that any violation of any rule prescribed under this section shall be treated as a violation of a rule under section 5 of the FTC Act (15 U.S.C. 45). The purpose of this section is to make available to the FTC in enforcing these rules the same remedies available to it in enforcing violations of rules promulgated under section 5. This subsection is not intended to imply any other connection between this bill and section 5 of the current FTC Act. Specifically, it is not the Committee's intention that violations of rules promulgated under this section must be found to be unfair to deceptive acts or practices under section 5 of the FTC Act.

Subsection (e) of this section provides that the rules promulgated under this section shall not be construed as preempting State law. It is the Committee's intention that State law regarding telemarketing remain in full force and effect, to be enforced by State officials as provided under those laws, through use of the State courts if appropriate. The intention of this bill is to provide an additional cause of action and remedy applicable to telemarketing activities, which are enforceable exclusively in the Federal courts.

SECTION 4.—ACTIONS BY STATE ATTORNEYS GENERAL

This section provides for enforcement of the FTC's telemarketing rules by the State attorneys general.

Subsection (a) of this section provides that the attorney general of any State may bring a civil action on behalf of its residents who are adversely affected by violation of any rule promulgated under this bill, and may obtain relief, including orders enforcing compliance with the rules or damages on behalf of the State's residents. The Committee does not consider this grant of authority as precedent for allowing the State attorneys general to enforce other laws within the FTC's jurisdiction, such as laws regulating national advertising.

Subsection (b) provides that the Federal district courts shall have exclusive jurisdiction over civil actions brought by the attorneys general to enforce this bill, and provides such courts with authority to issue necessary relief, including injunctions.

Subsection (c) provides that a State shall serve the FTC with prior written notice of any civil action it intends to file under the bill, unless such prior notice is not feasible, in which case notice shall be provided upon the filing of the civil action. It is the Committee's intention that the attorneys general will provide advance notice to the FTC of actions they contemplate. Such notice will be advantageous for both the States and the FTC to prevent duplication of effort; permit coordination of activities; and prevent inconsistent interpretations of the law, including the FTC's rules. The committee expects that State attorneys general will interpret FTC rules in a manner consistent with the FTC's interpretation and intent. The subsection further provides that the FTC shall have the right to intervene in any such case, and to file appeals of any order.

Subsection (d) provides venue and service of process requirements for actions brought by the attorneys general.

Subsection (e) provides that the bill does not affect current authority of the attorneys general under State law to conduct investigations and undertake certain related activities.

Subsection (f) provides that the section does not prevent State officials from proceeding in State court for any violation of State law.

Subsection (g) provides that State officials may not bring any civil action during the pendency of an FTC action against the same defendant for violation of the same rule. The purpose of this subsection is twofold: to prevent duplication of effort by enforcement officials, and to avoid unreasonably subjecting defendants to multiple actions simultaneously. Moreover, this subsection is not intended to preclude the attorneys general from intervening in actions brought by the FTC or otherwise assisting or cooperating with the FTC in such cases.

The Committee expects that, if it is administratively feasible, the FTC will distribute any funds or other assets recovered from the fraudulent telemarketer for the purpose of redress of the defrauded consumer (after deduction of appropriate FTC expenses incurred in connection with the lawsuit), to the extent that the victims of telemarketing fraud can be determined with reasonable certainty. This distribution should take place on an equitable basis to all identified victims of telemarketing fraud, including depository institutions that have reimbursed individual consumer victims for damages and therefore have borne the ultimate loss. Such distribution to depository institutions should take place only after, and if, all individual consumers have been compensated fully for their losses.

SECTION 5.—ACTIONS BROUGHT BY PRIVATE PERSONS

This section permits injured persons, including financial institutions, to bring actions to enforce the rules promulgated under the bill, if their actual damages equal or exceed $50,000.

Subsection (a) states that persons who may bring actions under this bill are those who actually purchased goods or services or are obligated to pay for goods or services, financial institutions, member organizations comprised of financial institutions, such as credit card companies, or the parent organization of such member organizations.

Subsection (b)(1) provides that any person adversely affected by a violation of a rule promulgated under this section may bring a civil action within 3 years of discovery of the violation if the amount of actual damages in controversy exceeds $50,000 and that relief including injunctions or damages may be obtained. It is the intention of the Committee that the damages which may be considered for purposes of meeting the $50,000 threshold are actual, as opposed to punitive, damages. Moreover, several plaintiffs or financial institutions may not aggregate damages for purposes of meeting this threshold. Rather, each individual or financial institution must be able to allege $50,000 in damages in its own right. With respect to member organizations of financial institutions, such organizations must have at least one institutional member organization which alleges $50,000 in damages in its own right.

Subsection (b)(2) provides that the Federal district courts have exclusive jurisdiction over actions brought under this section, and

provides the nature of relief that may be awarded, including injunctive relief.

Subsection (b)(3) provides that persons bringing such actions must provide prior written notice of such actions to the FTC, unless prior notice is not feasible, in which case notice must be provided upon the filing of the action. It is the Committee's expectation that, in all but the most exceptional cases, persons bringing such cases will provide advance notice to the FTC of actions they intend to bring. Such notice will be advantageous for both the person bringing the action and the FTC, to prevent duplication of effort and to prevent inconsistent or inaccurate interpretations of the law, including the FTC's rules. It is expected that parties bringing such actions will utilize the FTC's interpretations of its rules and will make every effort to apply the law in a manner consistent with the FTC's application. The FTC is given the right to intervene, including the right to file appeals of any orders.

Subsection (b)(4) provides that no person may file an action under this section during the pendency of an FTC action against the same defendant for violation of the same rules. The purpose and scope of this limitation is the same as that set out for actions by the attorneys general in connection with section 4(g).

Subsection (b)(5) establishes venue and service of process requirements for actions brought under the section.

Subsection (c) provides that the court may award costs and attorneys fees to the prevailing party in any litigation under this section.

Subsection (d) provides that this section does not preclude persons from pursuing remedies available to them under statute of common law.

SECTION 6.—VENUE

This section amends section 13 of the FTC Act to permit the court, when the interests of justice require, to join additional defendants regardless of whether those defendants have contacts with the district in which the case is pending, and to serve process on such defendants wherever the defendants are found.

SECTION 7.—SUBPOENA

This section amends section 20 of the FTC to permit the FTC to subpoena physical evidence as well as documentary evidence.

SECTION 8.—FALSE ADVERTISEMENTS CONCERNING SERVICES

This section amends section 12(a) of the FTC Act to clarify the FTC's authority to regulate false advertisements of services, in addition to its regulation of advertisements of food, drugs, devices, and cosmetics.

SECTION 9.—CLEARINGHOUSE

This section requires the FTC to establish a clearinghouse for inquiries made to Federal agencies about telemarketing. This section further requires that information from this clearinghouse is to be made available to the public, unless disclosure is otherwise prohib-

ited by law, and that the clearinghouse will direct public inquiries to the appropriate Federal or State agency.

SECTION 10.—FINANCIAL DATA

This section amends the Right to Financial Privacy Act of 1978 to permit court-ordered disclosure of financial records without notice to the subject of the records if the court finds that "dissipation, removal, or destruction of assets" subject to seizure for violation of the law is likely.

SECTION 11.—CRIMINAL CONTEMPT AUTHORITY

This section authorizes the FTC to bring criminal contempt actions for violations of orders obtained in cases brought under section 13 of the FTC Act. Such actions may be brought only under the same conditions as those under which the FTC currently may bring civil actions under section 16(a) of the FTC Act (15 U.S.C. 56(a)), including 45-day notice to the Attorney General, and the bringing of the action upon expiration of that period only if no action is taken by the Department of Justice.

SECTION 12.—ADMINISTRATION AND APPLICABILITY OF ACT

This section provides that the FTC shall enforce violations of the bill in the same manner, and with the same powers and duties, as are present under the FTC Act. The section further provides that this bill does not apply to any person exempt from the jurisdiction of the FTC, and does not vest the FTC, the attorneys general, or private parties with jurisdiction over any person over which the FTC does not otherwise have authority.

The intention of this provision is, in part, to make clear that this bill is not intended either to expand or to contract the scope of the FTC's authority over particular industries. This, to the extent that the FTC, currently or in the future, is precluded by other laws from regulating a particular entity (see, e.g., section 5(a)(2) of the FTC Act, the Soft Drink Interbrand Competition Act (15 U.S.C. 350, et seq.); and the McCarran-Ferguson Act (15 U.S.C. 101 et seq.), this bill is not intended to alter that preclusion. Similarly, if the FTC in the future is specifically permitted by another law to undertake regulation of a particular entity, it is the intention of this bill that the FTC be permitted to regulate any telemarketing of such entity.

SECTION 13.—LIFE CARE HOME STUDY

This section requires that the FTC conduct a study of unfair or deceptive acts or practices in the life care home industry and report to Congress on the results of that study within 24 months of enactment of the bill. Life care homes are residential facilities which undertake to provide living accommodations and services for the duration of the resident's life, based on a contract requiring a stated payment for such accommodations and services.

SECTION 14.—SUNSET

This section provides that sections 3, 4, and 5 of the bill, which provide for telemarketing fraud and abuse rulemakings and enforcement, will cease to be effective 5 years after enactment. This

provision will allow Congress to review the effectiveness, and the reasonableness of implementation, of these new causes of action and enforcement mechanisms before continuing the provisions indefinitely.

The Committee expects that the Congress will monitor closely and assess the suits brought pursuant to enactment of this bill in order to determine whether the statutory basis for such suits should be reauthorized. Among other factors, the Committee expects that Congress will consider whether such suits have been shown to be necessary, reasonable, and an efficient use of law enforcement resources, and whether they have hampered or promoted consistent interpretation and enforcement of FTC rules.

Changes in Existing Law

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman):

Federal Trade Commission Act

Section 12 of that Act

Sec. 12. (a) It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—

(1) By United States mails, or in or having an effect upon commerce, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of foods, drugs, devices, *services,* or costmetics; or

(2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in or having an effect upon commerce of food, drugs, devices, *services,* or cosmetics.

(b) * * *

Section 13 of that Act

Sec. 13. (a) Whenever the Commission has reason to believe—

(1) that any person, partnership, or corporation is engaged in, or is about to engage in, the dissemination or the causing of the dissemination of any advertisement in violation of section 12, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission under section 5, and until such complaint is dismissed by the Commission or set aside by the court on review, or the order of the Commission to cease and desist made thereon has become final within the meaning of section 5, would be to the interest of the public,

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States or in the United States court of any Territory, to enjoin the dissemination or the causing of the dissemination of such advertisement.

Upon proper showing a temporary injunction or restraining order shall be granted without bond. Any such suit shall be brought in the district in which such person, partnership, or corporation resides or transacts business. *Whenever it appears to the court that the interests of justice require that any other person, partnership, or corporation should be a party in such suit, the court may cause such person, partnership, or corporation to be summoned without regard to whether they reside or transact business in the distict in which the suit is brought, and to that end process may be served wherever the person, partnership, or corporation may be found.*

(b) Whenever the Commission has reason to believe—

(1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: *Provided, however,* That if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: *Provided further,* That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction. Any such suit shall be brought in the district in which such person, partnership, or corporation resides or transacts business. *Whenever it appears to the court that the interests of justice require that any other person, partnership, or corporation should be a party in such suit, the court may cause such person, partnership, or corporation to be summoned without regard to whether they reside or transact business in the distict in which the suit is brought, and to that end process may be served wherever the person, partnership, or corporation may be found.*

Section 16 of that Act

SEC. 16. (a)(1) Except as otherwise provided in paragraph (2) or (3), if—

(A) before commencing, defending, or intervening in, any [civil] *Federal court* action involving this Act (including an action to collect a civil penalty) which the Commission, or the Attorney General on behalf of the Commission, is authorized to commence, defend, or intervene in, the Commission gives written notification and undertakes to consult with the Attorney General with respect to such action; and

(B) the Attorney General fails within 45 days after receipt of such notification to commence, defend, or intervene in, such action;

the Commission may commence, defend, or intervene in, and supervise the litigation of, such action and any appeal of such action in its own name by any of its attorneys designated by it for such purpose. *The Commission may bring a criminal contempt action for violations of orders obtained in cases brought under section 13(b) of this Act in the same manner as civil penalty and other Federal court actions to which this subsection applies. Such cases may be initiated by the Commission on its own complaint, or pursuant to its acceptance of an appointment by a court to assist it in enforcing such orders pursuant to Rule 42(b) of the Federal Rules of Criminal Procedure.*

(2) through (5) * * *

(b) * * *

Section 20 of that Act

SEC. 20. (a) For purposes of this section:

(1) through (6) * * *

(7) The term "physical evidence" means any object or device, including any medical device, food product, drug, nutritional product, cosmetic product, or audio or video recording.

[(7)**]** *(8)* The term "violation" means any act or omission constituting an unfair or deceptive act or practice in or affecting commerce (within the meaning of section 5(a)(1)).

(b) * * *

(c)(1) Whenever the Commission has reason to believe that any person may be in possession, custody, or control of any *physical evidence or* documentary material, or may have any information, relevant to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 5(a)(1)), the Commission may, before the institution of any proceedings under this Act, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person *to produce such physical evidence for inspection,* to produce such documentary material for inspection and copying or reproduction, to file written reports or answers to questions, to give oral testimony concerning *physical evidence,* documentary material or other information, or to furnish any combination of such *evidence,* material, answers, or testimony.

(2) * * *

(3) Each civil investigative demand for the production of *physical evidence or* documentary material shall—

(A) describe each class of documentary material to be produced under the demand with such definiteness and certainly as to permit such *physical evidence or* material to be fairly identified;

(B) prescribe a return date or dates which will provide a reasonable period of time within which the *evidence or* material so demanded may be assembled and made available for inspection and copying or reproductive and

(C) identify the custodian to whom such *evidence or* material shall be made available.

(4) through (9) * * *

(10) The production of *physical evidence or* documentary material in response to a civil investigative demand shall be made under a sworn certificate, in such form as the demand designates, by the person, if a natural person, to whom the demand is directed or, if not a natural person, by any person having knowledge of the facts and circumstances relating to such production, to the effect that all of the *physical evidence or* documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the custodian.

(11) through (12) * * *

(d) through (j) * * *

RIGHT TO FINANCIAL PRIVACY ACT OF 1978

Section 1109 of that Act

DELAYED NOTICE—PRESERVATION OF RECORDS

SEC. 1109. (a) Upon application of the Government authority, the customer notice required under section 1104(c), 1105(2), 1106(c), 1107(2), 1108(4), or 1112(b) may be delayed by order of an appropriate court if the presiding judge or magistrate finds that—

(1) through (2) * * *

(3) there is reason to believe that such notice will result in—

(A) endangering life or physical safety of any person;

(B) flight from prosecution;

(C) destruction of or tampering with evidence;

(D) intimidation of potential witnesses; **[**or**]**

(E) dissipation, removal, or destruction of assets that are subject to forfeiture, seizure, redress, or restitution under any law of the United States by reason of having been obtained in violation of law; or

[E**]** *(F)* otherwise seriously jeopardizing an investigation or official proceeding or unduly delaying a trial or ongoing official proceeding to the same extent as the circumstances in the proceeding subparagraphs.

An application for delay must be made with reasonable specificity.

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